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No. 2

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959.

ARABIAN AMERICAN OIL COMPANY,

*Petitioner,*

*v.*

HOWARD FARMER,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.


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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Arabian American Oil Company, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgment entered in the above-entitled action on April 6, 1960.

### Opinions Below.

The opinion of the United States District Court, Southern District of New York, in favor of petitioner, is reported at 176 F. Supp. 45 and may be found at page 14, appendix A. The opinion in the Court of Appeals for the

Second Circuit, reversing the judgment of the District Court and remanding the case for a new trial, is reported at 277 F. 2d 46 and may be found at page 1, appendix A.

## Jurisdiction.

The Judgment of the Court of Appeals for the Second Circuit sought to be reviewed was entered on April 6, 1960. A timely petition for rehearing filed on April 21, 1960 was denied on April 28, 1960.

The statutory provision conferring jurisdiction on this Court is found at 28 U.S.C. §1254(1).

## Questions Presented.

These questions are set forth in the light of the conceded fact that New York law, which petitioner submits has been flatly ignored by the Court of Appeals for the Second Circuit, is clearly applicable in this case:

(a) Is an oral contract of employment "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia", within the New York statute of frauds, N. Y. Pers. Prop. Law §31(1), and therefore void and unenforceable because not in writing?

(b) Does the apparent authority of an employee to hire others on behalf of the corporation include the authority to enter into employment contracts "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia", when there is no express or implied authority to do so?

(c) May a contract of employment terminable at will be varied by parol evidence of a prior oral agreement to employ for a term?

## Statutes Involved.

The Fifth Amendment to the Constitution of the United States and New York Personal Property Law §31(1) are set forth at page 1, appendix B.

## Statement of the Case.

Respondent commenced this suit in the Supreme Court of the State of New York, New York County. The suit was removed by defendant to the United States District Court of the Southern District of New York upon the grounds of diversity of citizenship of the parties and the involvement of the required jurisdictional amount.

Respondent, an ophthalmologist, sued petitioner for $59,683* on the ground that petitioner terminated repondent's employment prior to the end of the term for which respondent alleged he was employed. Respondent alleged that he was employed for a term to last "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia,"** the offer and acceptance of employment allegedly having occurred in a telephone conversation on April 13, 1955. Dr. T. E. Allen, petitioner's associate medical director, was the one who conversed with respondent and allegedly entered into the oral contract of employment with respondent on behalf of petitioner. At the trial the respondent testified that he had told Dr. Allen that he "would not be interested in going for less than a period of five years" and that it was his understanding from this conversation that he was obligated to work for petitioner "for a period of five years or longer."***

Petitioner, on the contrary, introduced evidence that no one in its employ was employed for a term and that

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* Respondent increased this to $160,000 on June 17, 1960 after denial by the Court of Appeals for the Second Circuit of the petition for rehearing.

** Vol. I, p. 7a of certified record.

*** Vol. II, p. 27a of certified record.

everyone in its employ was employed at will and that respondent had himself signed an employment agreement, hiring him at will, on May 26, 1955.

Respondent entered petitioner's employ and worked at petitioner's hospital in Saudi Arabia until his discharge on February 5, 1956. Respondent consequently instituted suit for an alleged wrongful discharge. Petitioner introduced evidence to show respondent's discharge for cause. The jury at the trial in the District Court was unable to agree on whether or not the discharge was for cause.

Judge Edmund L. Palmieri of the District Court then granted petitioner's motion for a directed verdict on each of three grounds: (1) that if respondent had been employed pursuant to an alleged oral contract of employment that contract was void because of the statute of frauds; (2) that if Dr. Allen, an employee of petitioner, had promised respondent that he would be employed for the duration of petitioner's oil wells in Saudi Arabia, he lacked authority to make a promise of such unusual and extraordinary employment; and (3) that the agreement admittedly signed by respondent constituted a contract of employment at will and could not be varied by parol evidence of an alleged prior oral promise to employ respondent for a term.

On appeal the Court of Appeals for the Second Circuit reversed in an opinion by Circuit Judge Charles E. Clark. The Court of Appeals held that: (1) petitioner's oral agreement to employ respondent for the duration of defendant's oil operations in Saudi Arabia does not come within the New York statute of frauds; (2) there was sufficient evidence of Dr. Allen's apparent authority to hire respondent on a permanent basis to justify submission of the issue to the jury; and (3) when respondent signed the written employment agreement, there was no integration of prior agreements so as to prevent introduction of parol evidence as to the terms of employment.

## Reasons for Granting the Writ.

1. The decision of the Court of Appeals for the Second Circuit is in direct conflict with the decisions of the New York courts controlling in the case at bar in the following respects:

a. The holding of the Court of Appeals for the Second Circuit to the effect that the oral agreement between respondent and petitioner to employ respondent "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia" is not within the New York statute of frauds is in direct conflict with a long line of New York cases culminating with *Zupan* v. *Blumberg*, 2 N Y 2d 547 (1957).

b. The holding by the Court of Appeals for the Second Circuit that there was sufficient evidence of Dr. Allen's apparent authority to hire respondent "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia" to warrant submission of the issue to the jury is in direct conflict with the law in New York that such extraordinary agreements are unreasonable and not binding on the corporation absent its express authority to so agree.

c. The holding of the Court of Appeals for the Second Circuit that there was no integration of the oral agreement into the written confirmation of employment of May 26 so as to prevent resort to parol evidence as to the term of employment is contrary to the New York law to the effect that an agreement of employment at will cannot be varied by parol evidence of a prior oral agreement to employ for a term.

The rulings made by the Court of Appeals for the Second Circuit now sought to be reviewed are fundamental in the retrial of this case, involving as they do vital questions of evidence that will be encountered throughout the trial. These rulings are final and binding on the trial court. They will permit the introduction of testimony that should be clearly excluded on a retrial.

2. For the foregoing reasons the Court of Appeals for the Second Circuit has denied to petitioner his right to due process of law under the Fifth Amendment, by refusing to follow the applicable state law binding on the court in its adjudication of the case at bar.

## ARGUMENT IN SUPPORT OF REASONS.

### 1. Conflict with New York Law.

Under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the law of New York is of course controlling here. The District Court so found* and the parties so agreed.** Nevertheless, the Court of Appeals flatly refused to follow New York law and so created a conflict between its decision and those of the New York Court of Appeals.

This Court has indicated in its Rule 19(1)(b) that such a conflict is an important consideration in the granting of review on certiorari. Certiorari was granted on this ground as recently as 1958 in *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437 (1959). The Court there reversed the Court of Appeals for the Eighth Circuit for its failure to properly apply North Dakota law in determining the sufficiency of evidence needed to send a case to the jury, where the issue was whether an insured's death by gunshot wound was accidental or a suicide.

The review by this Court of conflicting evidence in the relatively infrequent case of death by gunshot wound does not appear to have the impact or contain the "special and important reasons" that are found in the case at bar, where

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* *Farmer* v. *Arabian American Oil Co.*, 176 F. Supp. 45, 47 n. 6, 49 n. 9, 51 (by implication) (S. D. N. Y. 1959).

** *Farmer* v. *Arabian American Oil Co.*, 277 F.2d 46, 49 (2d Cir 1960).

there is involved a fundamental law pertaining to the validity of an employment agreement in the nation's most active commercial state.

Contradictory decisions between the Court of Appeals for the Second Circuit and the New York Court of Appeals will confuse and mislead the large number of business firms and individuals who, every day, enter into employment agreements as part of the routine of engaging in commercial enterprises in such a center of commerce as New York.

**(a) Conflict with the New York statute of frauds.**

The Court of Appeals for the Second Circuit, in reversing the District Court, held that petitioner's oral agreement to employ respondent for the duration of defendant's oil operations in Saudi Arabia does not come within the statute of frauds, N. Y. Pers. Prop. Law §31(1),* and so may be enforced by respondent though not in writing. This is in conflict with *Zupan* v. *Blumberg*, 2 N Y 2d 547 (1957).

In *Zupan* the plaintiff, by oral agreement, was "to receive 25% commission on any account that he brought in *for so long as the account was active.*" (Emphasis added.) The court held that such an agreement was covered by the statute of frauds and therefore was unenforceable because not in writing.

In the case at bar respondent alleges that petitioner offered him employment *for so long as the petitioner has oil wells in the Kingdom of Saudi Arabia.* Yet the Court of Appeals for the Second Circuit held that the statute of frauds did not apply.

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* "§31. Agreements required to be in writing

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;

1. By its terms, is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime; . . ."

This inconsistency is made more apparent by the fact that both *Zupan* and Judge Clark's opinion in the case at bar rely on *Blake* v. *Voigt*, 134 N. Y. 69 (1892). In both *Zupan* and the instant case the plaintiff sought to show that the oral agreement was capable of performance within a year, and so outside the statute of frauds, because the defendant's business might dissolve or otherwise cease within a year, thus terminating the contract. The New York Court of Appeals in *Zupan*, however, adopted the holding of *Blake* that "termination is not performance [so as to fall outside the statute], but rather the destruction of the contract: . . where there is no provision authorizing either of the parties to terminate as a matter of right."*

The Court of Appeals for the Second Circuit in the instant case held that *Blake* v. *Voigt* controlled so as to cause the oral agreement to fall outside the statute because "plaintiff herein testified that defendant's obligation was expressly limited to the duration of its oil operations in Saudi Arabia."** Such fact obviously does not fit within the rule of *Blake* and *Zupan* that the agreement must authorize termination by either party as a matter of right in order for the statute not to apply.

This clearly erroneous use of the *Blake* case by the Court of Appeals for the Second Circuit also overlooks the distinction made in *Zupan* that service agreements of indefinite duration "must be in writing under the *Cohen* and *Martocci* cases—since performance is dependent, not upon the will of the parties to the contract, but upon that of a third party."***

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* *Zupan* v. *Blumberg*, 2 NY 2d 547, 550 (1957).

** *Farmer* v. *Arabian American Oil Co.*, 277 F.2d 46, 51 (2d Cir. 1960).

*** *Zupan* v. *Blumberg*, 2 NY 2d 547, 550 (1957).

Therefore, *Blake*, in which either party to the agreement had the express right to terminate it by giving notice within six months of the making of the agreement, can in this respect be distinguished from both *Zupan* and the case at bar, since in the case at bar *only* expropriation of petitioner's property or some similar act by a third party, the Kingdom of Saudi Arabia, could bring about the termination of the alleged oral agreement between petitioner and respondent.*

The ruling in *Zupan* was also based upon the earlier rulings of the New York Court of Appeals in *Cohen* v. *Bartgis Bros.*, 264 App. Div. 260 (1942), aff'd mem., 289 N. Y. 846 (1943) and *Martocci* v. *Greater N. Y. Brewery*, 301 N. Y. 67 (1950).

In *Cohen* the action was to recover commissions under an oral agreement whereby defendant agreed to pay plaintiff commissions "upon all orders placed by Resolute Paper Products Corp., at any time, whether or not plaintiff was in defendant's employ at the time of the placing of such orders." The court, relying on *Blake*, held that an answer asserting the statute of frauds as a defense was sufficient in law because such an agreement could not be performed within a year.

*Cohen* was the basis of an earlier construction of the New York statute of frauds by the Second Circuit Court of Appeals in *Droste* v. *Harry Atlas Sons, Inc.*, 145 F.2d 899 (1944). There the Second Circuit followed the applicable New York law. The plaintiff alleged an oral agreement to receive commissions on money received by the defendant

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* At the trial respondent testified (Vol. II, pp. 28a, 29a of certified record) as follows:

> Q. And the company was also obligated for a period of five years or longer unless its properties were nationalized?
>
> • • •
>
> A. Yes, sir.

under future contracts with any U. S. government agency, plaintiff having been hired to obtain such contracts. Circuit Judge Thomas W. Swan, with Circuit Judge Learned Hand concurring, stated at page 900:

> "But the possibility that subsequent contracts might be made would not, in our opinion, were we free to form one independently, justify holding that 'by its terms' the commission agreement was not to be performed within a year. . . . It has long been firmly established by New York cases that if an oral agreement may consistently with its terms be entirely performed within the year, even though it be neither probable nor expected that it will be performed within that time, it is outside the condemnation of the statute. . . .
>
> "We should, therefore, think it clear that the plaintiff's oral agreement is not within the statute were it not for Cohen *v.* Bartgis Bros. Co. . . .
>
> "We are unable to differentiate the oral agreement in the case at bar from the one invalidated by the statute of frauds in the Cohen case."

Judge Clark, however, vigorously dissented on the ground that *Cohen* turned "entirely upon pleading niceties", the court not wanting to rule harshly "in advance of hearing the testimony, that a jury could not find the contract one which required the defendant to perform for an unlimited period of time . . . or that, in the contemplation of the parties, it was intended to last for more than a year." *Id.* at page 901. He reiterated this view in his dissent to the denial of a petition for rehearing. 147 F.2d 675 (2d Cir. 1945).

This rationale has been completely dissipated by *Zupan*. There testimony had been taken at a trial but the ruling in *Cohen* was nevertheless adhered to.

Judge Clark's dissent in *Droste* further declared that "this case well illustrates the rigidity of decision forced upon us by a quite literal application of the doctrine of *Erie R. Co.* v. *Tompkins*" and recommended that litigants avoid the federal courts which were "bound by particular and often unclear, isolated precedents."*

It appears that Judge Clark, now writing for the majority in the case at bar, has been able to give direct assistance to the circumvention of binding state precedents, despite the fact that the clear, unambiguous holdings of *Zupan* and *Martocci*, coupled with *Cohen*, hardly amount to the "unclear, isolated" precedents Judge Clark saw fit not to follow 16 years ago in *Droste*. In 1960 in this case, Judge Clark again has seen fit not to follow the applicable New York precedents.

Nor should Judge Clark, simply because he believes that the statute of frauds is "an anachronism in modern life and we are not disposed to expand its destructive force,"** be able to ignore its application when the New York Court of Appeals continues to be bound by the statute.

In addition, the opinion of the Second Circuit in the case at bar glossed over respondent's "testimony that he felt himself obligated to remain in defendant's employ for a reasonable period of time, perhaps five years."*** No

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* 145 F.2d at 900-01.

** *Farmer* v. *Arabian American Oil Co.*, 277 F. 2d 46, 51 (2d Cir. 1960).

*** *Id.* at 50. In fact respondent had testified at the trial (Vol. II, p. 27a of certified record) as follows:

"Q. You felt there was an obligation to stay for five years; is that right? A. Yes.

Q. You felt that the company was obligated for five years; is that correct? A. I felt like the company was obligated for a great number of years, sir.

Q. But at least five years; is that right? A. Yes, sir.

Q. That was very important to you, that commitment on your part and on the company's part for five years at least; is that right? A. Yes, sir."

attempt was made by the court to rationalize this fact in terms of the court's theory that the contract could be performed within a year, despite the obvious application of the New York statute of frauds to an obligation of at least five years' duration.

It is respectfully submitted that the decision of the Court of Appeals for the Second Circuit in the instant case should be reversed in order to resolve the conflict between its decision and those of the New York Court of Appeals, which are binding on the federal courts in the case at bar.

**(b) Conflict with the New York law on authority to make permanent employment contracts.**

In holding that there was sufficient evidence of Dr. Allen's apparent authority to hire respondent "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia" to justify submission of the issue to the jury, the decision of the Court of Appeals is in direct conflict with the law of New York.

Though cases in point are uncommon in New York, their principles are clear and manifestly contrary to the Second Circuit's ruling in the case at bar. In *Carney v. New York Life Ins. Co.*, 162 N. Y. 453 (1900), the New York Court of Appeals held that an alleged oral agreement between plaintiff and the president of defendant insurance company by which the company was to hire plaintiff for life was invalid because the president's authority could not be deemed to include "the power to enter into unreasonable contracts as to the term of employment." The court found that employment for life was an unreasonable contract.

In *Heaman v. E. N. Rowell Co.*, 261 N. Y. 229 (1933), the New York Court of Appeals dismissed a complaint alleging an oral agreement of employment for life between plain-

tiff and defendant's president, holding that such executive officer of a corporation has no authority as such to make a contract for life employment, even under a general power to hire employees, and that the complaint failed because it did not show that the board of trustees of the defendant corporation had ever authorized or ratified the agreement in question.

In *Camacho* v. *Hamilton Bank Note & Engraving Co.*, 2 App. Div. 369 (1896), appeal dismissed, 158 N. Y. 663 (1899), the plaintiff was hired by the vice president and general manager of the defendant for a term of three years. The court, after noting that no other of the firm's employees were hired for a fixed term, held that a mere general manager could not, as a matter of law, bind his corporation to any agreement of employment to run for a series of years, absent either proof of actual authority to so contract or ratification by the corporation.

Such a general manager has no "power to bind his principal to contracts of an extraordinary nature and of such a character as would involve the corporation in enormous obligations and for long periods of time." *Id.* at 371.

Even assuming that Dr. Allen in the instant case had authority to hire employees, his authority certainly did not extend beyond the ordinary, nor was the alleged agreement with respondent "for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia" ever approved by the petitioner's board of directors or any other authority.

Yet the Court of Appeals for the Second Circuit refused to follow these New York decisions. Instead, it relied on *Lee* v. *Jenkins Bros.*, 268 F.2d 357 (2d Cir.), cert. denied, 361 U.S. 913 (1959), and *Usher* v. *New York Cent. & H. R. Co.*, 76 App. Div. 422 (1902), aff'd mem., 179 N. Y. 544 (1904).

But *Lee*, which involved a construction of Connecticut law, was decided on general principles of law after Judge

Medina's opinion noted that the law in Connecticut had not really dealt with the problem.* The part of the *Lee* decision most persuasive to the Court of Appeals for the Second Circuit in the case at bar was Judge Medina's statement to the effect that "apparent authority is essentially a question of fact."** However, the court below failed to note that Judge Medina excepted New York law from that statement when he said in a footnote on page 370 "but see *Carney* v. *New York Life Ins. Co.*, 1900, 162 N. Y. 453, 57 N. E. 78, 49 L. R. A. 471."

Furthermore, Judge Medina's full statement was that "beyond such 'extraordinary' acts, whether or not apparent authority exists is simply a matter of fact." What constitutes "extraordinary" acts can be ascertained on page 367 of *Lee* where Judge Medina stated:

> "But employment contracts for life or on a 'permanent' basis are generally regarded as 'extraordinary'*** and beyond the authority of any corporate executive if the only consideration for the promise is the employee's promise to work for that period."

For authority for that statement Judge Medina cited *Heaman* v. *E. N. Rowell Co.*, 261 N. Y. 229 (1933) and *Carney* v. *New York Life Ins. Co.*, 162 N. Y. 453 (1900).

The above statement from the *Lee* case could apply with equal vigor to the case at bar.

The opinion of the Second Circuit in the case at bar also relied on *Usher* v. *New York Cent. & H. R. Co.*, 76 App.

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* *Lee* v. *Jenkins Bros.*, 268 F.2d 357, 364 (2d Cir.), cert. denied, 361 U. S. 913 (1959).

** *Farmer* v. *Arabian American Oil Co.*, 277 F. 2d 46, 52 (2d Cir. 1960).

*** The agreement between respondent and petitioner in the case at bar was described by Judge Palmieri as one "of indefinite duration and could last a lifetime." *Farmer* v. *Arabian American Oil Co.*, 176 F. Supp. 45, (S. D. N. Y. 1959).

Div. 422 (1902), aff'd mem., 179 N. Y. 544 (1904), as authority for the rule that:

> "The New York courts have always recognized that in special circumstances an agent may have apparent authority to execute a lifetime employment contract."

In *Usher*, the court, after approving the principle set forth in *Carney*, upheld a lifetime employment agreement made between plaintiff and a supervisor of the defendant corporation on the ground that under the circumstances the agreement was reasonable and within the apparent authority of the supervisor. These justifying circumstances included the fact that the employment agreement was in consideration of the employee's release of his claim for damages arising out of the defendant's alleged negligence in causing him the loss of his leg, as well as the fact that the defendant kept the release until plaintiff's claim was barred by the statute of limitations, and then asserted the release as a defense in the pleadings in the action for breach of the employment agreement. The special circumstances which distinguished *Usher* from *Carney* also obviously distinguishes *Usher* from the instant case, which simply involves the everyday business experience of a man looking for a better job because he was not making enough money where he was.

Yet the Court of Appeals for the Second Circuit found in the instant case that the supposed fact that respondent "was reluctant to abandon his established practice in Austin unless assured of long-term employment" was a sufficient special circumstance to qualify under the *Usher* case.

But the "established practice" consisted of an office respondent had opened in Austin, Texas in October 1954,

only *six months* before he claimed to have entered into the contract of employment with petitioner in April 1955.*

In addition, respondent testified as follows:

> "Q. And because of the amount of income that you were making—you say it was less than $100 a month; is that correct? A. Well, actually the net profits from the—from it did not amount to $100 a month.
>
> Q. Was it in fact a loss, a net loss? I am talking now about the months of October, November and December 1954. A. Yes, it was a loss.
>
> Q. Therefore, you became interested in seeking a job; is that correct? A. Yes, sir."**

It is patently clear that this typical, even imperative, need for respondent to seek new employment cannot come within the "special circumstances" of the New York cases, such as *Usher*.

Consequently, the Second Circuit in the instant case not only refused to follow New York law, but the *Lee* case, on which it primarily relied, recognized that New York decisions conflicted with the *Lee* rule.

Therefore, petitioner respectfully asks that this Court grant a review of this case in order to remove the conflict between New York law, which should have governed, and the decision below.

**(c) Conflict with the New York parol evidence rule.**

The Court of Appeals for the Second Circuit reversed the District Court's ruling that parol evidence of a prior oral agreement was inadmissible to vary the terms of the contract set forth in writing in the employment agreement of May 26, 1955.

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* Vol. III, p. 62a (p. 9 of petition for rehearing) of certified record; transcript of testimony, pp. 94, 95.

** Vol. III, pp. 62a, 63a (pp. 9, 10 of petition for rehearing) of certified record; transcript of testimony, p. 96.

In holding that there was no integration of prior agreements so as to prevent introduction of parol evidence as to the terms of employment, the Second Circuit decision is again in conflict with New York law.

Though the discrepancy may not be as marked as in the two preceding issues, petitioner submits that the decision below refused to follow the New York rule as established by the New York Court of Appeals in *Miller* v. *Burlington Mills Ribbon Corp.*, 278 App. Div. 854 (1951) (mem.), aff'd mem., 304 N. Y. 600 (1952) and *Watson* v. *Gugino*, 204 N. Y. 535 (1912).

**2. Denial of due process of law.**

Petitioner and respondent had agreed that New York law governed.* This agreement was in accord with the ruling of the District Court.** Under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), this is clearly the correct interpretation of the law. Petitioner consequently prepared and argued its case before the Court of Appeals for the Second Circuit on the assumption that the decision would be made in the light of the controlling New York cases.

However, the Court of Appeals for the Second Circuit manifestly disregarded the binding New York precedents. Therefore, petitioner has been denied its right to have the case at bar adjudicated under the appropriate and applicable law. Its preparation, planning and arguments have been frustrated as a result. This amounts to a denial of due process as guaranteed by the Fifth Amendment of the Constitution of the United States.

Consequently, petitioner respectfully requests that its petition for a Writ of Certiorari be granted.

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* *Farmer* v. *Arabian American Oil Co.*, 277 F.2d 46, 49 (2d Cir. 1960).

** *Farmer* v. *Arabian American Oil Co.*, 176 F. Supp. 45, 47 n. 6, 49 n. 9, 51 (by implication) (S. D. N. Y. 1959).

## Conclusion.

For the foregoing reasons, the conflict between the decision of the Court of Appeals for the Second Circuit in the instant case and the established law of New York, which should control, is obvious and a resolution of this conflict is fundamental to the further conduct of this case.

But it is not for this reason alone that petitioner requests that this Court grant review of the case at bar. Because the New York law is so well settled on these issues, the diametrically opposed decision by the Second Circuit will cause great confusion and uncertainty. The commonly used means of hiring employees by an oral agreement will be in jeopardy. Business firms will not be adequately protected against unscrupulous employees. Other employees, acting in good faith, may delude themselves into believing their at-will employment is really for a term. Lawyers will be uncertain as to how to advise their clients. The federal and state courts located in New York, already heavily burdened, will be confronted with a new mass of needless litigation. Only by restoring to this situation the certainty of the New York law can the confusion be resolved.

Therefore, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Dated: July 5, 1960.

LOWELL WADMOND,
CHESTER BORDEAU,
*Counsel for Petitioner.*

GEORGE W. RAY, JR.,
T. DARRINGTON SEMPLE, JR.,
*Of Counsel.*

## APPENDIX A.

## Opinion of the United States Court of Appeals, for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

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No. 170—October Term, 1959.

(Argued January 15, 1960 Decided April 6, 1960.)

Docket No. 25854.

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HOWARD FARMER,

Plaintiff-Appellant,

*v.*

ARABIAN AMERICAN OIL COMPANY
(a Delaware corporation),

Defendant-Appellee.

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Before:

CLARK, HINCKS, and WATERMAN,
Circuit Judges.

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Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, Judge.

Howard Farmer appeals from a judgment for the defendant, Arabian American Oil Company, D. C. S. D. N. Y., 176 F. Supp. 45, in his action for damages for wrongful discharge from its employment. Reversed and remanded.

*Opinion of the United States Court of Appeals, for the Second Circuit.*

KALMAN I. NULMAN, New York City (William V. Homans, New York City, on the brief), for plaintiff-appellant.

CHESTER BORDEAU, of White & Case, New York City (William D. Conwell, of White & Case, New York City, on the brief), for defendant-appellee.

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CLARK, *Circuit Judge:*

This is an appeal from a defendant's judgment in an action for damages for breach of a contract of employment. The action was originally instituted in the New York Supreme Court and was removed to the court below, the parties being citizens of different states.

Plaintiff, a physician specializing in the practice of ophthalmology, initially contacted defendant by letter in response to an advertisement offering foreign employment. Defendant is a major oil company with extensive operations in the Middle East. Mr. A. B. Brautovich, "recruiting representative" for defendant, informed plaintiff that a position was available in Saudi Arabia, forwarded the appropriate application forms, and arranged for plaintiff's trip to New York for a personal interview. Plaintiff was interviewed by Dr. T. E. Allen, defendant's associate medical director, in charge of the company's medical affairs in the United States. Following this interview, Dr. Allen was in touch with plaintiff on several occasions in connection with pre-employment processing. Upon completion of these preliminaries Dr. Allen extended a definite offer of employment to plaintiff via telephone on April 13, 1955. Plaintiff accepted this offer and did not subsequently discuss the terms of employment with any of defendant's representatives. The formal offer of employment was confirmed by letter from the Personnel Department dated April 13, 1955. This letter did not recite the terms of employment, but

dealt primarily with travel arrangements.[1] It is agreed that plaintiff signed and returned the post card of confirmation as therein requested.[2] And pursuant to these instructions plaintiff reported to defendant's New York office on May 26, the day before his scheduled departure, to complete processing. Here he was instructed by various employees of defendant to complete a number of forms. These included a group insurance form, a hospital medical plan form, and a salary allotment form, as well as other miscellaneous papers. Among these was a form which plaintiff characterizes as a "workmen's compensation agreement," but which defendant claims as the "employment agreement."[3]

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[1] The body of this letter—addressed to Dr. Farmer at 409 W. 15th Street, Austin, Texas, and signed by A. T. Wisner, Assistant Manager, for G. A. Wood, Manager, Personnel Department—is as follows:

> "This will confirm our offer of employment.
>
> "You are scheduled to depart for Saudi Arabia by international air flight departing New York on May 27, 1955. Please arrange domestic transportation to permit you to report at 9:00 a.m., May 26th, at our office on the 7th floor, 505 Park Avenue, New York City, for processing.
>
> "You may present this letter to the domestic airline for clearance of the 66 pounds international baggage allowance.
>
> "It is imperative that you have your inoculation certificate with you.
>
> "Please confirm your acceptance of this formal offer of employment and advise us arrival time in New York. The enclosed post card may be used for this purpose.
>
> "Upon receipt of your confirmation, we will forward $21.00 New York expense allowance and $123.10 transportation allowance from Austin, Texas to New York. Should you desire, we shall also obtain reservations for you at the Park Sheraton Hotel. Should your arrival subsequently be delayed, please advise the hotel of such delay direct."

[2] The card contained the statements:

> "Employment offer accepted.
>
> "Will report as scheduled for processing and departure. I will have my innoculation [sic] record with me."

[3] This document, on the defendant's letterhead, entitled, "Employment in Foreign Service," is addressed to Dr. Farmer,

Plaintiff duly arrived in Saudi Arabia on May 30, 1955, and performed his duties at defendant's hospital until his discharge on February 5, 1956. As a consequence plaintiff instituted this action for damages for wrongful discharge. He contends that under the oral agreement of April 13 his term of employment was the duration of defendant's operation of its oil wells in Saudi Arabia. Defendant's position is that the employment was at will pursuant to the "employment agreement" of May 26. Defendant also asserts that plaintiff was an unsatisfactory employee, while plaintiff maintains that no proper cause for his discharge existed. After trial the jury was unable to reach agreement and was discharged. The court thereupon entered judgment for defendant in accordance with its motion for a directed verdict. Fed. R. Civ. P. 50(b). In his decision, D. C. S. D. N. Y., 176 F. Supp 45, Judge Palmieri relied upon three independent grounds for the result he reached: Parol evidence was inadmissible to vary the terms of the May 26

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Austin, Texas, is signed in the name of defendant by J. H. McDonald, and is marked "Accepted: Howard Farmer, Employee's Signature, Date: May 26, 1955."

The body of the document—which is a printed form with insertions as shown by the underlined material—is as follows:

> "This will confirm our offer of employment in the Company's Foreign Service to be effective on May 22, 1955.
>
> "Your annual rate of basic earnings will be U. S. $16,000.00.
>
> "Your initial job classification will be Ophthalmologist.
>
> "Benefits as provided in the New York Workmen's Compensation Law shall constitute the Company's entire liability and your exclusive remedy against the Company in the event of your disability or death whether arising out of or in the course of your employment or resulting from the use of transportation facilities operated by or for the Company.
>
> "Will you please confirm your acceptance of this offer by signing and returning two copies of this letter to us."

agreement; the alleged oral agreement was void under the statute of frauds; and Dr. Allen lacked authority to offer employment for the term alleged. The parties agree that these issues are to be determined by the law of the State of New York. We shall discuss each one in turn.

THE PAROL EVIDENCE RULE.

The court below held that, since the contract was set forth in writing in the "employment agreement" of May 26, 1955 (note 3 *supra*), evidence of a prior oral agreement was inadmissible. But we do not see how this conclusion is possible in view of the well settled rule that in order for all prior negotiations to be completely embodied in a written agreement the parties must intend such integration and that evidence *dehors* the writing is freely admitted to determine such intent. And here the evidence seems wholly clear that the parties did not visualize the truncated document of May 26 as embodying all the agreement between the plaintiff and the company.

"When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing. This is in substance what is called the 'parol evidence rule,' a rule that scarcely deserves to be called a rule of evidence of any kind, and a rule that is as truly applicable to written evidence as to parol evidence. The use of such a name for this rule has had unfortunate consequences, principally by distracting the attention from the real issues that are involved. These issues may be any one or more of the following: (1) Have the parties made a contract? (2) Is that contract void or voidable because of illegality, fraud, mistake, or any other reason? (3) Did the parties assent to a particular writing as the complete and accurate 'integration' of that contract?

"In determining these issues, or any one of them, there is no 'parol evidence rule' to be applied. On these issues, no relevant evidence, whether parol or otherwise, is excluded. * * * No one of these issues can be determined by mere inspection of the written document." 3 Corbin on Contracts §573 (1951), and see §582 collecting cases of "Evidence That the Writing Was Not Assented to as a Complete and Accurate Integration"; 9 Wigmore, Evidence §§2425, 2429 (3d Ed. 1940); 1 Restatement, Contracts §228 (1932); *U. S. Navigation Co.* v. *Black Diamond Lines*, 2 Cir., 124 F. 2d 508, 510, certiorari denied *Black Diamond Lines* v. *U. S. Navigation Co.*, 315 U. S. 816; *Caputo* v. *Continental Constr. Corp.*, Dec. 7, 1959, Mass., 162 N. E. 813, 816; *Lawrence* v. *Tandy & Allen, Inc.*, 14 N. J. 1, 100 A. 2d 891; *Jarvis* v. *Cunliffe*, 140 Conn. 297, 99 A. 2d 126; *Rinaudo* v. *Bloom*, 209 Md. 1, 120 A. 2d 184. The New York law is in accord. *Chapin* v. *Dobson*, 78 N. Y. 74, 79; *Beattie* v. *New York & L. I. Constr. Co.*, 196 N. Y. 346, 349, 89 N. E. 831; *Dickinson* v. *Dickinson*, 273 App. Div. 1055, 79 N. Y. S. 2d 833. A closely analogous case is *Leifer* v. *Scheinman*, 179 App. Div. 665, 167 N. Y. S. 105, where the writing dealt with the salary to be paid plaintiff, but not with his duties or the term of employment; in a suit for wrongful discharge he was allowed to show that the hiring was for a year.[4] This case has recently been quoted with approval by the New York Court of Appeals, *Laskey* v. *Rubel Corp.*, 303 N. Y. 69, 72, 100 N. E. 2d 140.

In the present case there is nothing to show that the parties intended an integration of their negotiations in the printed form of May 26, 1955; in fact, the contrary is

[4] The court below believed this case was overruled by *Miller* v. *Burlington Mills Ribbon Corp.*, 278 App. Div. 854, 104 N. Y. S. 2d 484, affirmed without opinion 304 N. Y. 600, 107 N. E. 2d 88. See D. C. S. D. N. Y., 176 F. Supp. 45, 49, n. 8. But it is not even cited in the *Miller* case, which concerned another issue, namely, an insufficient memorandum to satisfy the statute of frauds—an issue determined on the face of the pleadings without question of evidence.

strongly indicated. The recital of facts above showing a whole series of telephonic, written, and oral negotiations, with several statements of confirmed offer duly accepted, contains nothing to suggest an intent eventually to integrate the acceptances into some formal document. Quite obviously the parties proceeded on the basis that no writing was needed to complete the agreement. So a contract was made as early as the letter of April 13. The later document of May 26 is quite lacking in any normal terms of employment, including place and time and duration of employment, manner and time of payment, nature of occupation, and the like. And the plaintiff's testimony—which is not challenged on this issue—is that he was informed by an employee of defendant that it was merely a routine form involving workmen's compensation rights. The nature of the form suggests this conclusion. We think it therefore beyond dispute that there was no integration of the agreement so as to prevent resort to parol evidence of its terms.[5]

THE STATUTE OF FRAUDS.

Whether an oral agreement for the duration of defendant's oil operations in Saudi Arabia is void under the statute of frauds, N. Y. Pers. Prop. Law §31, poses a more troublesome question in view of the New York cases. Initially it would appear that, since the expressed contingency might occur within a year, the agreement is capable of performance within this period and thus does not fall within the statute. See 2 Corbin on Contracts §446 (1950). And

[5] Since evidence of intent to integrate is so wholly lacking we need not discuss the question whether this is an issue for the court or jury. On motion for summary judgment Judge Noonan had ruled that it was a jury question; and it was so submitted at the trial which failed because the jury did not agree. Earlier it had been held an issue for the court. *Seitz* v. *Brewers' Refrigerating Machine Co.*, 141 U. S. 510, 517; *Watkins Salt Co.* v. *Mulkey*, 2 Cir., 225 Fed. 739; see McCormick on Evidence §§215, 216 (1954); and cf. *Braxton* v. *Mendelson*, 233 N. Y. 122, 124, 135 N. E. 198.

this is true even on the plaintiff's testimony that he felt himself obligated to remain in defendant's employ for a reasonable period of time, perhaps five years. But several recent decisions of the New York Court of Appeals have created some uncertainty in respect to this principle. This uncertainty is reflected in the fact that the judgment appealed from is contrary to an earlier decision by Judge Weinfeld denying defendant's second pre-trial motion for summary judgment based on its claim as to the statute of frauds.

Defendant relies, as did the court below, upon *Zupan* v. *Blumberg*, 2 N. Y. 2d 547, 141 N. E. 2d 819; *Martocci* v. *Greater New York Brewery*, 301 N. Y. 57, 62-63, 92 N. E. 2d 887, 889; and *Cohen* v. *Bartgis Bros. Co.*, 264 App. Div. 260, 35 N. Y. S. 2d 206, affirmed without opinion 289 N. Y. 846, 47 N. E. 2d 443. See also *Droste* v. *Harry Atlas Sons*, 2 Cir., 145 F. 2d 899, rehearing denied 2 Cir., 147 F. 2d 675, certiorari dismissed 325 U. S. 891. Each of these cases involved an agreement to pay commissions on all future orders received from customers initially solicited by the agent. Thus the contractual relationship between the parties was by its terms permanent, even though the principal's liability was contingent upon the receipt of such future orders. *Martocci* v. *Greater New York Brewery*, *supra*, 301 N. Y. 57, 92 N. E. 2d 887.[6] By contrast, the contractual relationship herein involved did not extend beyond the defendant's operations in Saudi Arabia when, according to the plaintiff's testimony, the contract was to terminate.

It is urged, however, that in each of the above cited cases the relationship would be terminated by the disso-

[6] It should be noted that Professor Corbin's criticism of recent New York cases is not so much of their law as of their failing to see that as a *fact* more contracts than they have assumed *may* be performed within one year. Thus a contract to employ X "as long as he lives" *can* be performed within one year *Deo volente*, while a contract to work 20 years cannot. See 2 Corbin on Contracts §§445, 446 (1959 Supp.).

lution of the principal's business. In reply to a similar argument the New York Court of Appeals noted that such termination would constitute destruction of the contract rather than performance, since the agreement contained "no provision authorizing either or both of the parties to terminate as a matter of right." *Zupan* v. *Blumberg*, *supra*, 2 N. Y. 2d at 550, 141 N. E. 2d at 820, citing the leading case of *Blake* v. *Voigt*, 134 N. Y. 69, 31 N. E. 256. Since plaintiff herein testified that defendant's obligation was expressly limited to the duration of its oil operations in Saudi Arabia, we find *Blake* v. *Voigt* controlling, so that the alleged oral agreement falls without the statute. See *Krawitz* v. *Gross*, Sup., 156 N. Y. S. 2d 576; *Platt* v. *Whitelawn Dairies, Inc.*, 3 Misc. 2d 19, 150 N. Y. S. 2d 391, affirmed 2 A. D. 2d 683, 153 N. Y. S. 2d 583; Comments, 27 N. Y. U. L. Rev. 863 (1952), 16 Fordham L. Rev. 95 (1947). See also *Gruber* v. *S-M News Co.*, 2 Cir., 208 F. 2d 401; *National Service Stations* v. *Wolf*, 304 N. Y. 332, 107 N. E. 2d 473; *Kagan* v. *Gair, Sup.*, 194 N. Y. S. 2d 197.

Defendant asserts that the express inclusion of such a condition is insignificant, since it would be implied in any event. We share defendant's distaste for verbal niceties, but we must recognize that such a distinction is not a unique one in determining the scope of the statute of frauds, which refers to the "terms" of the contract. Compare the similar distinction generally drawn between employment for life and for a term of years. 2 Corbin on Contracts §§446, 447 (1950). The statute of frauds, as applied to such a contract as this, where plaintiff had performed for many months, is an anachronism in modern life and we are not disposed to expand its destructive force. 2 Corbin on Contracts §444 (1950).

### Dr. Allen's Authority to Contract.

Defendant's position, adopted by the court below, is that the alleged contract, under which plaintiff might be

employed for life, is of such an unusual and extraordinary nature as to require proof of Dr. Allen's actual authority to make such an agreement. Reliance is placed upon *Heaman* v. *E. N. Rowell Co.*, 261 N. Y. 229, 185 N. E. 83; *Carney* v. *New York Life Ins. Co.*, 162 N. Y. 453, 57 N. E. 78; *Davidson* v. *Library Bureau*, 234 App. Div. 47, 254 N. Y. S. 95, modified 259 N. Y. 654, 182 N. E. 221; *Camacho* v. *Hamilton Bank-Note & Engraving Co.*, 2 App. Div. 369, 37 N. Y. S. 725, appeal dismissed 158 N. Y. 663, 52 N. E. 1123. See also *Clifford* v. *Firemen's Mut. Benev. Ass'n of City of New York*, 232 App. Div. 260, 249 N. Y. S. 713, affirmed without opinion 259 N. Y. 547, 182 N. E. 175; *Beers* v. *New York Life Ins. Co.*, 66 Hun 75, 20 N. Y. S. 788. It is also urged that there is no evidence of such actual authority; but that the contrary is established. We shall assume, *arguendo*, that neither express nor implied actual authority has been shown, and pass to the question of apparent authority.

The question of an agent's apparent authority to bind his principal to a contract of lifetime employment has recently been extensively discussed by this court in *Lee* v. *Jenkins Bros.*, 2 Cir., 268 F. 2d 357, 363-371, certiorari denied 361 U. S. 913. It was there noted that the law in this area is in a state of evolution, thus accounting for the failure of the courts to evolve any guiding principles. 2 Cir., 268 F. 2d 357, 368-369. Such development also renders earlier precedents doubtful authority. Thus it would be a mistake to consider *Camacho* v. *Hamilton Bank-Note & Engraving Co.*, *supra*, 2 App. Div. 369, 37 N. Y. S. 725, appeal dismissed 158 N. Y. 663, 52 N. E. 1123, as reflecting the current status of New York law. There the court in 1896 held that a general manager had no apparent authority to hire an employee for a three-year term at a sliding scale of $2,000 to $4,840 a year. True, the New York courts in recent years have rarely had occasion to consider the question herein presented. The most recent opinion cited by

the defendant was written in 1933. *Heaman* v. *E. N. Rowell Co., supra*, 261 N. Y. 229, 185 N. E. 83. Compare the 1956 decision in *Grossman* v. *Redi-Food Co.*, 2 A. D. 2d 670, 152 N. Y. S. 2d 624.

As Judge Medina concluded in *Lee* v. *Jenkins Bros., supra*, 2 Cir., 268 F. 2d 357, 370, apparent authority is essentially a question of fact. The New York courts have always recognized that in special circumstances an agent may have apparent authority to execute a lifetime employment contract. See *Usher* v. *New York Cent. & H. R. Co.* 76 App. Div. 422, 78 N. Y. S. 508, affirmed 179 N. Y. 544, 71 N. E. 1141; cf. *Rague* v. *New York Evening Journal Pub. Co.*, 164 App. Div. 126, 149 N. Y. S. 668. Thus we must examine the circumstances attending plaintiff's employment.

There can be little doubt that Dr. Allen had apparent, if not actual authority to offer employment to the plaintiff. Defendent's recruiting representative invited plaintiff to travel to New York from Austin, Texas, at the company's expense for the sole purpose of interviewing Dr. Allen, whom the representative described as "in charge of hiring." At the trial Dr. Allen testified that his duties included "recruiting and developing candidates for positions on the medical staff in Saudi Arabia for the hospital." So after receiving a formal offer from Dr. Allen, plaintiff received the letter from the defendant's Personnel Department quoted in note 1 *supra* which recited that it confirmed the offer of employment. We have therefore only to consider the extent of the commitment which Dr. Allen might make.

As bearing on the term of employment which Dr. Allen might make, the foreign location, the type of position, and plaintiff's age and occupation are among the relevant circumstances. In view of the difficulty of recruiting employees, especially qualified medical personnel, and of the expenses incurred by defendant in transporting its

employees from the United States, it would seem as likely that employment in Saudi Arabia would be for a minimum term as it would be at will.[1] Although defendant might be reluctant to offer long-term employment in positions requiring the exercise of executive discretion, this factor would seem less applicable in the case of experienced medical personnel. Plaintiff was no longer a young man, being 47 years of age at the time of employment. In addition, he was reluctant to abandon his established practice in Austin unless assured of long-term employment. In view of these circumstances we conclude that there was sufficient evidence of Dr. Allen's apparent authority to justify submission of the issue to the jury.

JUSTIFIABLE DISCHARGE.

Defendant asks finally that the judgment be affirmed because the evidence conclusively established plaintiff's discharge for cause. While defendant presented evidence on this issue, we agree with the conclusion reached by the court below: "It was a vigorously contested factual issue, appropriately within the province of the jury to decide." D. C. S. D. N. Y., 176 F. Supp. 45, 47. Indeed, it was on this issue that the jury was unable to reach agreement.

Thus the judgment is reversed and the action is remanded for trial.

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[1] In a letter dated January 12, 1956, to the United States Department of State, relating to plaintiff's status, defendant stated, *inter alia:* Dr. Farmer "is a regular employee in the foreign service of this Company. • • • The Company • • • regards regular employment as career and permanent, subject to the usual conditions of lay-off, resignation and termination common to industry. Our personnel policies reflect this understanding and seek to foster longevity of service."

## Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of April one thousand nine hundred and sixty.

Present:

Hon. CHARLES E. CLARK,
Hon. CARROLL C. HINCKS,
Hon. STERRY R. WATERMAN,
*Circuit Judges.*

HOWARD FARMER,
Plaintiff-Appellant,

*v.*

Arabian American Oil Company (a Delaware corporation),
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for trial in accordance with the opinion of this Court; with costs to the appellant.

A. DANIEL FUSARO,
Clerk.

## Opinion of the District Court for the Southern District of New York.

UNITED STATES DISTRICT COURT,

S. D. NEW YORK.

July 28, 1959.

HOWARD FARMER,

*Plaintiff,*

*v.*

ARABIAN AMERICAN OIL COMPANY (a Delaware Corporation),

*Defendant.*

Appearances:

WILLIAM V. HOMANS, Esq., Attorney for Plaintiff, 122 East 42nd Street, New York City, KALMAN I. NULMAN, Esq., of Counsel.

WHITE & CASE, Esqs., Attorneys for Defendant, 14 Wall Street, New York City, CHESTER BORDEAU and WILLIAM CONWELL, Esqs., of Counsel.

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PALMIERI, J.

Defendant moves for judgment in accordance with its motion, during the trial, for a directed verdict. Fed. R. Civ. P. 50(b). Unhappily, after almost two weeks of testimony and many hours of deliberation, the members of the jury were unable to agree and they were discharged.

The plaintiff, a physician, seeks damages for his alleged wrongful discharge from defendant's employment. His suit is based upon an alleged oral contract of employment pursuant to which plaintiff was to have been employed as an ophthalmologist in defendant's hospital and public health installation in the Kingdom of Saudi Arabia "for the

duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia."[1]

The defendant, in its answer, denied the alleged oral contract and alleged that the plaintiff was hired pursuant to a written agreement. This was in the form of a letter of the defendant offering the plaintiff employment, and countersigned by the plaintiff so as to indicate his acceptance.[2] Further, the defendant alleged two affirmative defenses: first, that the alleged oral agreement of employment was

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[1] The amended complaint alleges:

"THIRD: That on or about the 13th day of April, 1955, plaintiff and defendant entered into an agreement whereby it was mutually agreed that for the duration of defendant's operation of its oil wells in the Kingdom of Saudi Arabia, plaintiff would be employed by defendant as an ophthalmologist in defendant's installation in the Kingdom of Saudi Arabia, and in consideration therefor defendant would pay plaintiff a salary of $16,000., plus $4,000. living allowance, per annum for such period. That in reliance upon such promise and agreement by the defendant, plaintiff entered upon such employment.

"FOURTH: Plaintiff has duly performed all the terms and conditions of said agreement on his part to be performed until on or about the 12th day of March 1956, when defendant breached said contract on its party [sic] by discharging plaintiff from his employment and refusing to permit him to continue therewith."

---

[2]

*"Employment in Foreign Service*

"Dear Dr. Farmer:
Austin, Texas

"This will confirm our offer of employment in the Company's Foreign Service to be effective on May 22, 1955.

"Your annual rate of basic earnings will be U. S. $16,000.00.

"Your initial job classification will be Ophthalmologist.

"Benefits as provided in the New York Workmen's Compensation Law shall constitute the Company's entire liability and your exclusive remedy against the Company in the event of your disability or death whether arising out of or in the course of your employment or resulting from the use of transportation facilities operated by or for the Company.

void because it was not in writing,[3] and second, that the plaintiff's employment was terminated for good cause.

The matter of good cause was much bruited at the trial and was the rock on which the jury deliberations foundered. It was the subject of the first of the framed issues submitted to the jury. The members of the jury were unable to reach agreement as to whether good cause existed for the plaintiff's discharge.[4]

Upon plaintiff's direct examination at the trial, defendant objected to testimony concerning the alleged oral contract of employment and was granted a continuing objection to such testimony on the basis of (a) the parol evidence rule; (b) the Statute of Frauds; and (c) plaintiff's failure to prove the authority of Dr. Allen, the defendant's repre-

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"Will you please confirm your acceptance of this offer by signing and returning two copies of this letter to us.

Very truly yours,

ARABIAN AMERICAN OIL COMPANY

By /s/ J. H. McDonald

"ACCEPTED:

/s/ Howard Farmer

Employee's Signature

Date: May 26, 1955"

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[3] New York Personal Property Law §31:

"Agreements required to be in writing

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

"1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime:

" . . . "

See discussion *infra*, p. 12 *et seq.*

[4] The framed issues submitted to the jury are reproduced as an appendix hereto. No objection thereto was made by the plaintiff, although a general objection was expressed by the defendant.

sentative who allegedly made the oral contract in the course of a long distance telephone conversation with plaintiff. Defendant was also permitted to reserve its right to strike this testimony for the reasons stated. At the close of plaintiff's case defendant was permitted to reserve its motions until all the evidence had been received, when it renewed its objection and moved that the testimony be stricken. Decision was reserved. The defendant also then moved for judgment on grounds (b) [Statute of Frauds] and (c) [lack of authority] as above indicated, and on the further ground that the plaintiff testified that it was his understanding that he was employed for a period of at least five years, and that such an agreement would be void under the Statute of Frauds. After the discharge of the jury, the defendant moved for judgment pursuant to Fed. R. Civ. P. 50 (b) on all the above grounds and on further ground that the evidence established beyond any question its justification for discharging the plaintiff.

I shall not refer again to the question of justifiable discharge. It was a vigorously contested factual issue, appropriately within the province of the jury to decide. As to the motion for judgment on the ground that the contract, as plaintiff understood it,[5] was void under the Statute of Frauds, that ground will not sustain the motion, for plaintiff's "understanding" of his obligation under the contract does not establish that the parties' minds met on that subject. E.g., *Lee* v. *Jenkins Brothers*, F. 2d (2d Cir. 1959) (pages 1364-1365 of the slip sheet opinion).

[5] This motion is based on plaintiff's testimony, at the trial, that he understood he was obligated to remain in defendant's employ for a reasonable period of time, perhaps five years. Transcript, pp. 239-240.

THE NEW YORK[6] PAROL EVIDENCE RULE.

The letter of May 26, 1955, set forth in footnote 2, *supra*, evidences only a hiring at will. *Watson* v. *Gugino*, 204 N. Y. 535 (1912); *Martin* v. *New York Life Ins. Co.*, 148 N. Y. 117 (1895). If plaintiff's testimony that he was orally promised employment for so long as defendant was operating its oil wells in Saudi Arabia was inadmissible, there has been a failure of proof and defendant is entitled to judgment on the ground that the evidence established only a hiring at-will under which it was free to discharge plaintiff at any time, with or without cause.

The testimony of the plaintiff was that the oral contract was made in the course of a telephone conversation which took place on April 13, 1955 between Dr. T. E. Allen, a member of the defendant's medical staff, and himself. One of Dr. Allen's duties was to interview candidates for positions on the medical staff of defendant's hospital in Saudi Arabia and it was in this connection that he met plaintiff in February 1955. The testimony upon which plaintiff relies is as follows:

> "I told him that I did not want to go over there for a very short time, a few months or anything like that, and I would not be interested in going for less than a period of five years and he says, 'Well, we cannot measure this in years due to the circumstances of being expropriated or something of that kind, but you will have that job so long as we operate oil wells, and—in Arabia.' And I said, 'Very well. With that assurance I will accept the position.' And he said, 'You are hired.' " (Transcript, p. 57).

In substance, there is a writing setting forth an agreement, and a prior alleged oral agreement, both relating

[6] The New York law on this question is here controlling. *Smith* v. *Bear*, 237 F.2d 79, 83 (2d Cir. 1956); *Long* v. *Morris*, 128 F.2d 653 (3d Cir. 1942).

to plaintiff's employment by defendant. Since the writing and the alleged oral contract are tied together in time and by their subject matter, the plaintiff cannot avoid or add to the writing by proof of an oral understanding. Probably the most cogent expression of the applicable law was made in the case of *St. Regis Paper Co.* v. *Hubbs*, 235 N. Y. 30, 138 N. E. 495 (1923). The Court there quoted with approval the following statement from a leading authority on evidence (*St. Regis Paper Co.* v. *Hubbs, supra* at 35, 138 N. E. at 496):

> "When a legal act is reduced into a single memorial, all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms of their act. (Wigmore on Evidence § 2425)."

The Court then went on to say (at p. 36, 138 N. E. at 496-97):

> ".... Evidence of a parol brokerage agreement was therefore incompetent to show that the formal writings were not the final repository of the agreement before us.
>
> " 'You can no more add to or contradict its legal effect by parol stipulations preceding or accompanying its execution than you can alter it through the same means in any other respect.' *Thomas* v. *Scutt*, 127 N. Y. 133, 140, 27 N. E. 961, 963."

In the early case of *Eighmie* v. *Taylor*, 98 N. Y. 288 (1885), the Court enunciated the applicable principle of law which remains valid to this day. In commenting upon the importance of sustaining a rigid application of the parol evidence rule, the Court there said (*Eighmie* v. *Taylor, supra*, at p. 294):

> "For if we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself."

And further, the Court said (*Eighmie* v. *Taylor*, *supra*, at pp. 294-295):

> "If upon inspection and study of the writing, read, it may be, in the light of the surrounding circumstances in order to its proper understanding and interpretation, it appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement, it constitutes the contract between them and is presumed to contain the whole of that contract."

The case of *Miller* v. *Burlington Mills Ribbon Corp.*, 278 App. Div. 854, 104 N. Y. S. 2d 484 (2d Dep't 1951), *aff'd without opinion*, 304 N. Y. 600, 107 N. E. 2d 88 (1952), provides a persuasive parallel with the facts here. There, as here, the employer sent the employee a letter which the employee accepted. There, as here, the writing specified the position and the yearly compensation, but stated nothing with respect to the precise duration of the employment. There, as here, the employee sued the employer for damages based upon wrongful discharge. There, as here, the plaintiff-employee sought to prove the duration of his employment by oral proof. In its *per curiam* opinion granting judgment on the pleadings in favor of the defendant, the Appellate Division said (278 App. Div. at p. 854, 104 N. Y. S. 2d at 485):

> "The note or memorandum upon which the respondent relies evidences only a hiring at will • • •

> and recourse may not be had to parol evidence to establish a different intention of the parties (*Drake* v. *Seaman*, 97 N. Y. 230; *Matter of Levin*, 276 App. Div. 739; *Brodie* v. *Fink*, 275 App. Div. 1061)."

In the *Miller* case, the plaintiff claimed unsuccessfully both in the Appellate Division and in the Court of Appeals that the phrase "on the basis of $14,000.00 a year" was ambiguous and could be interpreted by oral proof to mean a year's employment,[7] thereby satisfying the Statute of Frauds. The *per curiam* opinion of the Appellate Division just quoted, and the affirmance, without opinion, by the Court of Appeals, clearly rejected the plaintiff's contention. While the *Miller* case arose in the context of the Statute of Frauds, its holding that the written contract was not ambiguous and that prior oral negotiations could not be proven, is equally applicable here.

It follows, therefore, that under the applicable New York law the plaintiff would not be permitted to introduce proof of his alleged oral contract,[8] that he would be bound by his written agreement, and that pursuant to this agreement his employment was terminable at will. On this ground alone, judgment must be entered for the defendant.

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[7] "We submit that the phrase 'on the basis of $14,000.00 a year' is ambiguous and may be interpreted to mean a year's employment. If so interpreted, the Statute of Frauds is satisfied. Parol evidence may be received to aid in the interpretation of an ambiguous phrase in a contract without violating the Statute of Frauds. [Citation omitted.] A trial is needed at which such evidence may be introduced, and therefore it was error to grant judgment on the pleadings." Appellant's Brief on Appeal 6, *Miller* v. *Burlington Mills Ribbon Corp.*, 304 N. Y. 600, 107 N.E. 2d 88 (1952).

[8] The decision in *Leifer* v. *Scheinman*, 179 App. Div. 665, 167 N. Y. Supp. 105 (1st Dep't. 1917), which is to the contrary, must be deemed to have been overruled by *Miller* v. *Burlington Mills Ribbon Corp.*, *supra*, note 7.

THE NEW YORK[9] STATUTE OF FRAUDS

The alleged oral contract sued on by the plaintiff is unenforceable under the New York Statute of Frauds, *supra*, note 3. Assuming the plaintiff's testimony with respect to his alleged oral contract, *supra*, p. 7, to be admissible and to be true, the only reference to the termination of plaintiff's employment was Dr. Allen's answer to plaintiff's statement that he would not be interested in employment of less than five years' duration. Dr. Allen said, in substance, that, barring expropriation "or something of that kind," plaintiff would "have that job as long as we operate oil wells . . . in Arabia." The clear purport of this language is that plaintiff's employment would come to an end by the destruction of defendant's business, through expropriation, or discontinuance of defendant's business through dissolution or otherwise.

It is the settled New York rule that an oral contract which is not, by its terms, to be performed within one year, is void under the Statute of Frauds and unenforceable. Thus, contracts measured in duration by the following terms have been held to be void: an oral agreement to pay percentage commissions "on any account that he brought in for so long as the account was active," *Zupan* v. *Blumberg*, 2 N. Y. 2d 547, 549, 161 N. Y. S. 2d 428, 429 (1957); an oral agreement to pay the plaintiff a commission "on all sales made" by the defendant to P. Lorillard & Co. "and paid for by them," *Martocci* v. *Greater New York Brewery*, 301 N. Y. 57, 61, 92 N. E. 2d 887, 888 (1950); an oral agreement whereby defendant agreed to pay commissions "upon all orders placed by Resolute Paper Products Corp., at any time, whether or not plaintiff was

[9] The New York law on this subject governs here. *Macias* v. *Klein*, 203 F. 2d 205 (3d Cir.), *cert. denied sub nom. Macias* v. *Oakland Truck Sales*, 346 U. S. 827 (1953); *Kossick* v. *United Fruit Co.*, 166 F. Supp. 571 (S. D. N. Y. 1958).

in defendant's employ at the time of the placing of such orders." *Cohen* v. *Bartgis Bros. Co.*, 264 App. Div. 260, 35 N. Y. S. 2d 206, 207 (1st Dep't 1942), *aff'd per curiam*, 289 N. Y. 846, 47 N. E. 2d 443 (1943). See also, *Droste* v. *Harry Atlas Sons, Inc.*, 145 F. 2d 899 (2d Cir.), *rehearing denied*, 147 F. 2d 675 (2d Cir.), *cert. denied*, 325 U. S. 891 (1945).

It should be noted, in passing, that these cases are to be distinguished from *Nat Nal Service Stations, Inc.* v. *Wolf*, 304 N. Y. 332, 107 N. E. 2d 473 (1952), where the New York Court of Appeals passed upon an oral agreement whereby the defendants promised that so long as plaintiff purchased its requirements for gasoline through the defendants, and the defendants accepted such orders, the latter would pay the plaintiff an amount equal to the discount allowed to defendants on each gallon by the source of supply. The Court held that the oral agreement sought to be enforced by the plaintiff did not run afoul of the Statute of Frauds because it could have been terminated, as a matter of right, by either party at any time. Each order and acceptance was there regarded as a separable transaction. See also Comment, 16 Fordham L. Rev. 95 (1947).

In the oral agreement testified to by the plaintiff here, there is no provision giving either party the power to terminate as a matter of right at any time. Assuming defendant's promise to have been, as plaintiff testified, that his employment would last "so long as we operate oil wells . . . in Arabia," it comes within the Statute as defined by the *Zupan*, *Martocci* and *Cohen* cases. Nor can expropriation, dissolution of defendant's business, or defendant's cessation of its business operations, or, possibly, the exhaustion of the wells, be deemed to constitute a termination, by its terms, of the oral agreement. This argument is disposed of by the following language of the Appellate Division in *Cohen* v. *Bartgis*, *supra*, at 261-262, 35 N. Y. S.

2d at 208, language recently referred to with approval by the Court of Appeals in *Zupan* v. *Blumberg*, *supra*, at 550, 161 N. Y. S. 2d at 429:

> "It is suggested that Resolute Paper Products Corp. or the defendant might retire from business or dissolve within a year, in which event the contract would be impossible of further performance and thus would terminate. But 'termination is not performance, but rather the destruction of the contract * * * where there is no provision authorizing either of the parties to terminate as a matter of right.' (*Blake* v. *Voigt*, 134 N. Y. 69.) It could be argued with equal force that a contract for personal services for a period exceeding one year is not within the statute because the employee might die within the year. Such, however, is not the rule prevailing in this State. (*Wahl* v. *Barnum*, 116 N. Y. 87; *Kelley* v. *Champlain Studios, Inc.*, 223 App. Div. 388; *Deutsch* v. *Textile Waste Merchandising Co.*, 212 id. 681.) We must distinguish between 'performance' which fulfills the contract and circumstances which defeat its purpose. (2 Williston on Contracts [Rev. ed.], §.499.)"

All that has been written in this section depends upon the assumption that the plaintiff's testimony concerning the alleged oral agreement was admissible. The Statute of Frauds, however, in addition to the parol evidence rule, prohibits such testimony. *Miller* v. *Burlington Mills Ribbon Corp.*, *supra*.

Accordingly, the defendant is also entitled to judgment because the Statute of Frauds prohibits the admission into evidence of the testimony concerning the alleged oral contract and because, even if the testimony were admissible, the alleged oral contract is void under the Statute.

*Opinion of the District Court for the Southern District of New York.*

THE EXTRAORDINARY NATURE OF THE ALLEGED ORAL AGREEMENT.

The contract which plaintiff here seeks to enforce is one that would be of indefinite duration and could last a lifetime. Apart from what has been said up to this point, such a contract would be unusual and extraordinary. The defendant proved, without contradiction, that no one in its employ had any comparable contract. The enforceability of such contract meets with two serious difficulties: one based upon the lack of proof of the agent's authority (here Dr. Allen) to make such a contract, and the other based upon the general hostility of the courts to lifetime employment contracts.

New York courts have required proof of the agent's authority before permitting the corporation to be bound and none was offered in this case. Indeed, the defendant's proof was that Dr. Allen had no such authority. *Camacho v. The Hamilton Bank-Note & Engraving Co.*, 2 App. Div. 369, 372, 37 N. Y. Supp. 725, 727 (1st Dep't 1896); 1 Wigmore, Evidence §92 (3d ed. 1940).

Contracts for life employment have been the subject of exhaustive discussion in a recent opinion of the Court of Appeals of the Second Circuit and I need add nothing to what is said there. *Lee v. Jenkins Brothers, supra*, at ..... (pages 1375-1376 of the slip sheet opinion):

> "It is not surprising that lifetime employment contracts have met with substantial hostility in the courts, for these contracts are often oral, uncorroborated, vague in important details and highly improbable. Accordingly, the courts have erected a veritable array of obstacles to their enforcement. They have been construed as terminable at will, too indefinite to enforce, *ultra vires*, lacking in mutuality or consideration, abandoned or breached by subsequent acts, and the supporting evidence deemed insufficient

to go to the jury, as well as made without proper authority."

The New York cases are to be found in footnotes 19, 23, and 31 of the *Lee* v. *Jenkins Brothers* opinion. See also, *Maple Island Farm* v. *Bitterling*, 209 F. 2d 867, 878 (8th Cir.), *cert. denied*, 348 U. S. 882 (1954).

Whether the oral contract in question is regarded as an extraordinary contract or a lifetime contract, the absence of proof in the trial record of Dr. Allen's authority to bind defendant to such a contract is fatal to plaintiff's position.

The defendant's motion is granted. The clerk is directed to enter judgment forthwith dismissing the complaint.

So Ordered.

Dated: New York, N. Y.
July 28, 1959.

Edmund L. Palmieri,
U. S. D. J.

*Opinion of the District Court for the Southern District of New York.*

CIVIL 107 OPIN 133

APPENDIX.

5/21/59

"*Re: Howard Farmer v. Arabian American Oil Company*—Civil 111-103

SPECIAL VERDICT

1. Was plaintiff's employment terminated by defendant on February 5, 1956 for good cause? ..... YES ..... NO

[If you answer this question in the affirmative, you should return a verdict for the defendant and you should proceed no further.]

[If you answer this question in the negative, answer question 2.]

2. Was plaintiff hired:

(a) For so long as defendant operated its oil wells in Saudi Arabia? ..... YES ..... NO

(b) For so long as defendant operated its oil wells in Saudi Arabia but terminable by plaintiff only for any reason after the expiration of five years? ..... YES ..... NO

(c) For so long as both parties were satisfied and subject to termination at will by either plaintiff or defendant? ..... YES ..... NO

[If you answer part (a) or part (b) of this question in the affirmative, answer question 3. If you answer part (c) in the affirmative, do not answer any further questions and return a verdict for the defendant.]

3. What is the amount of plaintiff's damages from March 12, 1956 to the date of trial? $.....

[It is agreed that plaintiff's payroll termination date was March 12, 1956.]"

Note: Upon the trial plaintiff waived any damages beyond that date.

# APPENDIX B.

## United States Constitution.

AMENDMENT V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## New York Personal Property Law.

"§31. Agreements required to be in writing

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

"1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime: . . . ."